IN THE COURT OF APPEALS STATE OF

ARIZONA DIVISION TWO

OFFICE OF THE COCHISE COUNTY ATTORNEY, APPELLANT, v. DAVID MORGAN, APPELLEE.	Case No. 2 CA-CV 2018-0093 Cochise County Superior Court No. CV 201700670

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF ARIZONA, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND THE SOCIETY OF PROFESSIONAL JOURNALISTS

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INTRODUCTION

This case concerns an issue that is critically important not just to news publishers, but to the general public: The right to speak out about public affairs means that, except in the narrowest of circumstances, the publication of important information should not be subject to a prior restraint, and the right to print lawfully obtained information should be upheld. Both are essential protections of the First Amendment and the Arizona Constitution.

There may be legitimate reasons to protect grand jury materials from wide public disclosure. But any requirement to keep such materials confidential must restrict government action, not censor the press or the speech of private citizens, to remain consistent with constitutional principles. Once information is in the public's hands, the government's ability to control the spread of that information is naturally and properly limited.

The superior court reached the correct result in this case – it refused to grant the preliminary injunction requested by the Cochise County Attorney's Office ("County Attorney") because the court concluded that the County Attorney could not succeed on the merits of his claim. Tr. March 2, 2018, at 221. Defendant-appellee David Morgan violated no law; if the court were to construe Arizona's grand jury secrecy statute, A.R.S. § 13-2812, to bar Morgan's publication in this

context, the statute would unquestionably infringe freedom of speech and freedom of the press.

ARGUMENT

I. An order to punish or restrict the release of lawfully obtained information is improper.

A. Restrictions on the release of lawfully obtained information rarely satisfy constitutional standards.

The U.S. Supreme Court has consistently recognized the importance of protecting the publication of truthful information that has been lawfully obtained. Generally, state action "to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979). State officials cannot constitutionally punish publication of lawfully obtained truthful information about a matter of public significance "absent a need to further a state interest of the highest order." *Id.* at 103. To restrict publication of lawfully obtained information, the danger presented by publication must be "clear and present." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 845 (1978); *see also Craig v. Harney*, 331 U.S. 367, 376 (1947) ("The danger must not be remote or even probable; it must immediately imperil.").

In several cases, the Supreme Court has held that valid restrictions on the publication of such information are very rare. In *Cox Broadcasting Corp. v. Cohn*, a Georgia statute made it a misdemeanor to publish the name of a rape victim. 420

U.S. 469, 472-73 (1975). A reporter obtained the name of the rape victim by attending the trial and examining indictments made available for inspection in the courtroom, and later broadcast the name of the rape victim on television. *Id.* at 473-74. The Court refused to allow sanctions against the press for publishing this truthful, lawfully obtained information. *Id.*

Two years later, in *Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308, 309 (1977), the Supreme Court analyzed an Oklahoma statute making juvenile proceedings private "unless specifically ordered by the judge to be conducted in public." The press obtained a juvenile's name and photograph by attending a detention hearing, which was never closed, and published the information. *Id.* at 311. At a later arraignment hearing, the lower court enjoined the media from publishing the name or photograph of the juvenile. *Id.* at 309. The Supreme Court held the injunction unconstitutional, however, because the information was obtained at hearings open to the public and there was no evidence that the press obtained the information unlawfully. *Id.* at 311.

Two years after *Oklahoma Publishing*, in *Daily Mail*, the Court considered whether a West Virginia statute violated the First and Fourteenth Amendments by making it a crime for newspapers to publish the names of juvenile offenders without the written approval of the juvenile court. 443 U.S. at 98. Two newspapers published the name of a 14-year-old who had shot a classmate. *Id.* The papers

learned the name of the shooter by monitoring the police band radio frequency, arriving at the scene, and speaking with witnesses, the police, and an assistant prosecuting attorney at the scene. *Id.* After publication, the newspapers were indicted by a grand jury for violating the West Virginia statute. *Id.* at 100. In holding the charges unconstitutional, the Court stated that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* at 103. Also, "once the truthful information was 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain its dissemination." *Id.*

In *Landmark Communications*, a Virginia statute punishing publication of information regarding the proceedings of a confidential judicial review commission was held to be unconstitutional. 435 U.S. at 838. The interests sought to be protected by restricting publication included confidentiality, witness protection, and confidence in the judiciary as an institution. *Id.* at 835. The Court concluded that "the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom." *Id.*

Subsequently, in *Florida Star v. B.J.F.*, the Court surveyed these cases and recognized three considerations, which it called the "*Daily Mail* synthesis," that

should be used to determine the propriety of restrictions on lawfully obtained information. 491 U.S. 524, 534 (1989). First, the publication must be lawfully obtained. *Id.* (citing *Daily Mail*, 443 U.S. at 103). Second, a court determines whether "imposing liability . . . serves 'a need to further a state interest of the highest order.'" *Id.* at 538 (citing *Daily Mail*, 443 U.S. at 103). The final consideration is the "'timidity and self-censorship' which may result from allowing the media to be punished for publishing certain truthful information." *Id.* at 536 (citing *Cox*, 420 U.S. at 496).

In *Florida Star*, a Florida statute made it unlawful to "print, publish, or broadcast . . . in any instrument of mass communication" the name of a victim of sexual offense. 491 U.S. at 526. The Florida Star was found civilly liable under this statute after publishing the name of a rape victim discovered in publicly available police reports. *Id.* When discussing lawfully obtained information, the Court held that "[w]here information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." *Id.* at 534. The Court noted that "the fact that state officials are not required to disclose [police reports which reveal the identity of the victim of a sexual offense] does not make it unlawful for a newspaper to receive them when furnished by the government." *Id.* at 536. Also, the fact that the government failed to fulfill its obligation to keep confidential the

name of a sexual offense victim does not make receipt of that information by the newspaper unlawful. *Id.*

Morgan's publication, when analyzed under the *Daily Mail* synthesis, meets the threshold for being "lawfully obtain[ed] truthful information about a matter of public significance" that merits full First Amendment protection. *Florida Star*, 491 U.S. at 533.

B. An order to punish or restrict the release of lawfully obtained information, even when the source of the information obtained it unlawfully, is improper.

The U.S. Supreme Court has also extended publication protections where media members published information lawfully received but from a source who obtained the information unlawfully. In *Bartnicki*, several individuals, including members of the media, were sued for releasing the contents of an unlawfully recorded cell phone conversation. 532 U.S. at 518-19. The conversation was recorded by an unknown source and placed in one individual's mailbox, who then distributed the recordings to another individual and several media outlets. *Id.* The question in the case was whether the wiretapping statute — prohibiting intentional disclosure of illegally intercepted communications that the disclosing party knows or should know was illegally obtained — violated the First Amendment when applied to these facts. *Id.* at 525.

The Court considered that (1) the defendants played no part in illegally intercepting the conversation; (2) the defendants obtained access to the tapes lawfully, even though the tapes were intercepted unlawfully; and (3) the conversation was a "matter of public concern." *Id.* The Court concluded that the recipient could not be held liable under the statute because "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party." *Id.* at 530-31. The Court has also held that "privacy concerns give way when balanced against the interest in publishing matters of public importance." *Id.* at 534.

Restrictions on publishing lawfully obtained information raise issues of great constitutional significance and can have widespread implications on the freedom of the press, including a possible chilling effect on the publication of important information. Morgan's right to publish the lawfully obtained information, and the public's right to access that information, outweigh the County Attorney's concerns related to privacy and the administration of justice. The Court should reject the County Attorney's attempt to restrict Morgan's publishing the lawfully obtained grand jury information as such restriction would violate Morgan's First Amendment rights.

II. The County Attorney requested an order that would be an unconstitutional prior restraint on speech.

A. Morgan and the general public have rights associated with Morgan's web-based publication.

Historically, courts in the United States have placed great emphasis on the importance of free speech, and the freedom of the press, as hallmarks of our democratic form of government. As part of this tradition, it is the news media that shoulders the "[g]reat responsibility . . . to report fully and accurately the proceedings of government." *Cox*, 420 U.S. at 491-92. The press "does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Phoenix Newspapers, Inc. v. Super. Ct.*, 101 Ariz. 257, 259 (1966) (quoting *Craig*, 331 U.S. at 374).

Even though Morgan is a web-based publisher, any order restricting his right to publish nevertheless implicates free-speech ***and*** free-press rights. The freedom of the press "is not confined to newspapers and periodicals," but "comprehends every sort of publication which affords a vehicle of information and opinion." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (citations omitted).

The public also has an interest in publishers' work because the "freedom of speech 'necessarily protects the right to receive'" speech, and the First Amendment thus extends to the right to "receive information and ideas." *Va. State Bd. of*

Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972)). That is, the protection is afforded "to the ***communication***, to its source and to its recipients both." *Id.* at 756 (emphasis added).

B. The County Attorney's requested "takedown" order is a presumptively unconstitutional prior restraint on speech.

The County Attorney asked the superior court to order Morgan to depublish materials that he already made available to the public through his website. Even where material has already been posted, an order demanding that it be removed from the Internet constitutes a restraint on its continued publication. The Ninth Circuit has characterized takedown orders as "classic prior restraint[s] of speech." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (quoting *Alexander v. United States*, 509 U.S. 544, 550 (1993), which held that "[t]emporary restraining orders and permanent injunctions — i.e., court orders that actually forbid speech activities — are classic examples of prior restraints").

Extensive U.S. Supreme Court precedent has held that prior restraints — directing a party not to publish information it already possesses — are impermissible and presumptively invalid. *Near v. Minnesota*, 283 U.S. 697 (1931); *see also KPNX Broad. Co. v. Super. Ct.*, 139 Ariz. 246, 251 (1984) (prior restraints must overcome a "heavy presumption against its constitutional validity"). In fact, prior restraints on publication are "the most serious and least tolerable

infringement on first amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The Arizona Constitution also prohibits prior restraints with "words too plain for equivocation." *Phoenix Newspapers*, 101 Ariz. at 259. Under Article 2, section 6 of the Constitution, "[t]here can be no censor appointed to whom the press must apply for prior permission to publish for … '[i]t is patent that this right to speak, write, and publish cannot be abused until it is exercised.'" *Id.* (quoting *Dailey v. Super. Ct.*, 112 Cal. 94, 44 P. 458 (1896)); *see* Ariz. Const. art. 2, § 6 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."). In addition, "the burden on the Government is not reduced by the temporary nature of a restraint," such as a preliminary injunction. *Nebraska Press*, 427 U.S. at 559 (citing *N.Y. Times v. United States*, 403 U.S. 713 (1971)).

C. The County Attorney's asserted interests in privacy and administration of justice do not overcome the presumptively invalid prior restraint.

Prior restraints are a "most extraordinary remedy" and are appropriate "only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (quoting *Nebraska Press*, 427 U.S. at 562). Though the government "may deny access to information and punish its theft, government ***may not prohibit or punish*** the publication of that information once it falls into the hands of the

press, unless the need for secrecy is manifestly overwhelming." *Landmark Commc'ns,* 435 U.S. at 849 (Stewart, J., concurring) (emphasis added).

In the context of a judicial proceeding, and mindful of the exceptional nature of restraints on publication, the validity of an order enforcing a prior restraint depends on (1) the nature and extent of the harm; (2) "whether other measures would be likely to mitigate the effects" of that harm; and (3) how "effectively [a prior restraint] would operate to prevent" the harm. *Nebraska Press*, 427 U.S. at 562; *see also KPNX Broad. Co.*, 139 Ariz. at 251.

In *Near v. Minnesota*, the Supreme Court recognized that prior restraints may be appropriate in very limited cases, such as in reports of troop movements in wartime or incitement to overthrow the government. 283 U.S. at 716. The Court has repeatedly found prior restraints unjustified, however, even in the face of weighty countervailing interests. *See, e.g.*, *Nebraska Press*, 427 U.S. at 556 (prior restraint on publication of criminal defendant's confession unjustified, even in light of risk to Sixth Amendment rights); *N.Y. Times v. United States*, 403 U.S. 713 (1971) (prior restraint on publication of "Pentagon Papers" unjustified, despite national security concerns).

In short, a takedown order as requested in this case would be a prior restraint on publication in violation of Morgan's rights under the First Amendment and the Arizona Constitution. The potential harms advanced by the County Attorney are

speculative and do not meet the high bar necessary to justify the "extraordinary remedy" of a prior restraint. *See Davis*, 510 U.S. at 1318 (refusing to rely on "speculative predictions as based on 'factors unknown and unknowable'") (quoting *Nebraska Press*, 427 U.S. at 563).

III. The court below properly concluded that using the grand jury disclosure statute as the basis for a takedown order would likely be unconstitutional in this case.

A.R.S. § 13-2812, the statute restricting disclosure of grand jury information, cannot constitutionally be the basis for a takedown order in this case. The statute makes it a Class 1 misdemeanor to knowingly disclose "any matter attending a grand jury proceeding, except in the proper discharge of official duties[.]" As discussed above, an order to punish or restrict the release of lawfully obtained information is presumptively unconstitutional. *KPNX Broad. Co.*, 139 Ariz. at 251. In order to punish publication of "truthful information about a matter of public significance," state officials must prove a "need to further a state interest of the highest order." *Daily Mail*, 443 U.S. at 103.

The trial court correctly concluded that A.R.S. § 13-2812 could not, consistent with constitutional principles, be construed to apply to Morgan in this case. The trial court held that

> to read the statute to include the basis for the Court to enter a prohibition and the removal of speech by Mr. Morgan would encompass not only Mr. Morgan but anyone who received Mr. Morgan's information . . . all those thousands of people . . . . I can't

> read this law as to require that all citizens who come into possession of this grand jury information and come into it legally . . . have to obtain a court order before they disseminate it or risk being in violation — criminal violation of the law.

Tr. March 2, 2018, at 221.[1]

IV. The trial court acted properly under the standards for a preliminary injunction, particularly in light of the First Amendment implications in this case.

A. The trial court correctly decided the question of whether the County Attorney was "likely to prevail."

A preliminary injunction requires the party seeking the order to establish: "1) A strong likelihood that he will succeed at trial on the merits; 2) The possibility of irreparable injury to him not remediable by damages if the requested relief is not granted; 3) A balance of hardships favors himself; and 4) Public policy favors the injunction." *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1991).

Generally, deciding whether to grant a preliminary injunction "is within the sound discretion of the trial court, and its decision will not be reversed absent an

[1] The other two statutes invoked by the County Attorney to support his requested injunction are so plainly inapplicable in this case that the superior court did not even address them. A.R.S. § 39-121.04 is among the public records statutes that apply to records held by the government and sought by the public. It does not govern the conduct of private citizens at all. Likewise, A.R.S. § 21-312 clearly is meant to prohibit court personnel, parties to a case, and parties' attorneys from disclosing juror information. It also does not apply to private citizens. Even if one or both of these statutes could be read to apply to private citizens, the same analysis below regarding A.R.S. § 13-2812 would apply: the statutes cannot bar the publication of lawfully obtained truthful information consistent with the U.S. and Arizona Constitutions.

abuse of that discretion." *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 367 (1999). Appellate courts typically review trial court orders granting or denying preliminary injunctions under the clear error standard, but when "the underlying issues in th[e] case involve matters of statutory interpretation and application, [appellate] review is de novo." *Kromko v. City of Tucson*, 202 Ariz. 499, 501 (App. 2002).

In a case like this, where the government seeks a preliminary injunction implicating First Amendment rights, its burden is doubly high. Typically, in a First Amendment case, where the party whose speech is affected is seeking a preliminary injunction, there is "'an inherent tension: the moving party bears the burden of showing likely success on the merits—a high burden if the injunction changes the status quo before trial—and yet within that merits determination the government bears the burden of justifying its speech-restrictive law.'" *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014) (quoting *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011)). In this case, though, the government both seeks to restrict Morgan's speech and to do so at a preliminary stage in the proceedings.

Moreover, the "mandatory" nature of the injunction requested by the County Attorney also subjects its review to higher scrutiny because it seeks to remove speech from the public sphere, rather than simply maintain the status quo. *See*

Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994) (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir.1979)) (distinguishing between prohibitory and mandatory injunctions, with the former preserving the status quo, and the later going "'go[ing] well beyond simply maintaining the status quo . . . [and being] particularly disfavored'").

The trial court correctly concluded that that the County Attorney did not meet its high burden at this stage. Because granting an injunction against Morgan under A.R.S. § 13-2812 would require an unconstitutionally broad reading of the statute, the trial court concluded that the County Attorney had not shown a strong likelihood of prevailing on the merits. In explaining its conclusion, the trial court noted that it could not "read [A.R.S. § 13-2812] to require any citizen who comes into legal possession of this information . . . as having to obtain a court order in order to disseminate it or risk being subject to criminal prosecution . . . and still find that it's a constitutional law." Tr. March 2, 2018, at 221.

B. The trial court properly addressed the issue of "irreparable injury."

Contrary to the County Attorney's claim, OB at 33, the trial court also concluded that the County Attorney did not meet its burden of showing irreparable injury. Specifically, the court stated, "[i]n terms of irreparable injury . . . it is out there en masse . . . and there's no way to claw it back. In terms of the ability to

pick a jury and have a fair trial . . . it's going to be much more problematic than it would have been . . . but it can be done." Tr. March 2, 2018, at 222.

This conclusion is supported by the record. County Attorney McIntyre's testimony defeats his office's own irreparable injury argument. McIntyre testified that his principal concerns in seeking the preliminary injunction were three-fold: "do[ing the] victim . . . good, remov[ing] the grand jurors' names from the public sphere, [and] . . . remov[ing] the grand jury transcript" from Facebook. *Id*. at 117. It is extremely unlikely that a preliminary injunction would prevent irreparable injury in any of these three areas.

The County Attorney did not, and could not, show that the published information's continued presence online could possibly cause irreparable harm to the victims of the crime at issue. As the trial court noted, the published information "is out there en masse. That toothpaste is out of the tube, and there's no way to claw it back." *Id.* at 222. When potentially thousands of people have accessed information and have the power to re-distribute it themselves, a mandatory injunction requiring the removal of the original publication is not likely to affect how accessible the information is to the public.

Similarly, the County Attorney did not prove that the published information's continued presence online could possibly cause irreparable harm to the effectiveness of grand jury proceedings. McIntyre testified that he was

concerned "that certain people might not be willing to talk as freely if they think that the next day their picture or, you know, their testimony is going to be plastered on the page." *Id.* at 123-24. This fear of a chilling effect on witness testimony in the grand jury was purely speculative, however, and cannot justify a preliminary injunction.

The County Attorney also did not establish that the published information's continued presence online could possibly cause irreparable harm at trial. McIntyre testified that he "always ha[s] a concern: Are we going to get enough jurors?" *Id.* at 133. This concern about being unable to "impanel a fair and impartial jury," in the absence of a preliminary injunction, however, was admittedly only "possible," and therefore speculative. *Id.* at 132-33. Moreover, this speculation was contradicted by the County Attorney's experience because he testified that he had never known that situation to occur.

In sum, the trial court noted that "courts pick juries all the time and in cases for which there is [a] substantial amount of publicity . . . it can be tough and it can take awhile, but it can be done." *Id.* at 222; *see Skilling v. United States*, 561 U.S. 358, 384 (2010) ("[T]he widespread community impact [of the case] necessitated careful identification and inspection of prospective jurors' connections to [the defendant's corporation], [but] the extensive screening questionnaire and followup voir dire were well suited to that task.").

CONCLUSION

This Court should affirm the superior court's decision rejecting the County Attorney's request for a preliminary injunction against defendant-appellant David Morgan and remand the case to the superior court.

Respectfully submitted this 12th day of February 2019.

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Certificate of Service

I hereby certify that on February 12, 2019, I electronically filed Amicus Curiae's Brief with the Clerk of the Court of Appeals, Division Two, by using the Court's efiling system.

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Certificate of Compliance

Pursuant to Rule ARCAP, Rule 14, undersigned counsel certifies that this brief is double spaced, uses a 14-point proportionally spaced t typeface and contains 4,784 words.

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